80-574

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE ATTORNEY GENERAL OF NEW JERSEY,

Petitioner,

vs.

ROBERT BISACCIA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Robert Bisaccia moves the Court for an Order to proceed in this Court In Forma Pauperis with his response to the petition filed by the Attorney General of New Jersey for a writ of sertiorari to the United States Supreme Court pursuant to the provision of title 28 and the rules of this Court. In support thereof attached is affidavit of said respondent.

Counsel for respondent,

Allen C. Marra

ALLEN C. MARRA, ESQ.
356 Millburn Avenue
Millburn, New Jersey, 07041
201-376-6780

IN THE

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Petitioner,

vs.

ROBERT BISACCIA,

Respondent.

AFFIDAVIT

ROBERT BISACCIA, being duly sworn according to law, upon his oath deposes and says:

1. I am a citizen of the United States and the respondent in the above entitled action.

2. I desire to respond to the Attorney General of New Jersey who is petitioning this Court for a writ of certiorari from the Order of the United States Court of Appeals, Third Circuit pursuant to 286 S C section 1257, but because of my poverty I am unable to pay the cost of filing a respondent brief with appendix etc or give security therefore and still be able to provide myself and dependents with the necessities of life.

3. I have had to use the services of Public Defender

for this case for the State of New Jersey right up to the Federal Court and do not have the necessary funds to provide at this time.

4. I believe I am entitled to the redress I seek and request that I be permitted to file a typewriten brief in response to the petition for writ of certiorari by the Attorney General of New Jersey to the United States Supreme Court.

WHEREFORE, affiant prays that he may have leave to proceed in the Court In Forma Pauperis.

SWORN and SUBSCRIBED to
by me this 9 day of
November, 1980

Allen C. Morris

Robert Bisaccia
ROBERT BISACCIA
Respondent

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Respondent.

BRIEF FOR RESPONDENT

ALLEN C. MARRA, ESQ.
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Millburn, New Jersey, 07041
201-376-6780

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NOTE: Respondent adopts the Questions Presented for Review by the Petitioner and the Attached Appendix to Petitioner's Brief.

CASES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE ATTORNEY GENERAL OF NEW JERSEY

Petitioner,

vs.

ROBERT BISACCIA,

Respondent.

BRIEF FOR RESPONDENT

The respondent hereby adopts the petitioner's following as set forth in petitioner's brief.

1. Opinions below.
2. Jurisdiction.
3. Constitutional Provisions, Statues, Court and Evidence rules involved.
4. Statements of the case, questions presented.

REASONS FOR DENYING THE WRIT

POINT 1

THE RESPONDENT'S CLAIM HAS SATISFIED THE REQUIREMENTS OF 28 U.S.C. SECTION 2254 (a) IN THAT THE STATE REMEDIES HAVE BEEN EXHAUSTED AND RESPONDENT WAS DENIED DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The Third Circuit of Appeals ruling, that respondent's federal due process claim was exhausted as a result of his complaint in the State Courts that his trial was not fair does not directly conflict with the decision of the Second and Eighth Circuits as urged by petitioner.

Exhaustion of state remedies means only that the claim must have been presented to the highest available State Court and that Court given the opportunity to pass on the merits. The mere opportunity to pass on the claim in the highest State Court is sufficient even though that Court merely denies a discretionary review. See Brown v Allen, 344 U.S. 443; 73 S. Ct. 397; U.S v Barwick, 331 F. 2d 597 (4th. Cir. 1964).

Beyond the issue of inadequacy or non existence of a State remedy, it has frequently been held that special circumstances serving the ends of justice will allow the Federal Courts to act without exhaustion of state remedies. Where resort to State Courts would be futile because they have already denies petitioner's issue adversly to him, the Federal Courts have waived the

exhaustion requirement, Allen v Perini, 424 F 2d 134 (6th.Cir. 1970); Reed v Beto, 343 F 2d 723,725 (5th. Cir. 1965). A determination of whether substance of respondent's claim was advanced in State Court requires a scrutiny of the Federal Habeas Court of the points that were raised in the State Courts in order to insure that the State system was granted a fair opportunity to confront arguments that are propounded to the Federal Habeas Courts, Zicarelli v Grey, 543 F 2d 466, 472 (3rd Cir. 1976),(EN BANC).

The petitioner argues that this Court has jurisdiction to grant the writ of certiorari based upon the fact that the position taken by the Third Circuit is in direct conflict with that of the Second and Eighth Circuits. In Johnson v Metz,609 F 2d 1052 (2nd.Cir. 1979), the Court therein decided that there was no exhaustion of state remedies in the sense that the State Court has never had a reasonable opportunity to consider the conduct of the trial judge in the Johnson case as deficient and federal constitutional grounds. In Johnson v Metz, supra there was a absence of a claim of a federal constitutional violation. In addition thereto the State Court did not have an opportunity to decide the same "ultimate" question for disposition standard as set forth in Picard v Connor, 404 U.S. 270,276,42 Sup.Ct. 509,512. To put it succinctly the claim of the petitioner in the Johnson case that was presented to the State Court was not the substantial equivalent of the claim ascerted in a Federal

Habeas Petition and neither did the State Court have an opportunity to review the claim as couched in a Fourteenth Amendment Due process violation. The claim of the petitioner herein did meet the Picard test for exhaustion of state remedies. The New Jersey Supreme Court in its method of analysis was consisten and synonymous with the classic findings required with Fourteent Amendment due process violations. The dissent by Justice Pashma of the New Jersey Supreme Court that the trial was "patently" unfair is a description similar to the traditional characterization used to assess purported Fourteenth Amendment due process violations.

In Thomas v Wyrick, 622 F 2d 44 (8th.Cir. 1980). the Court dismissed the petition for Habeas for want of exhaustion of state remedies. The Court in Thomas stated that there is under law of Missouri presently available State procedure for the determination of the merits of petitioner's claim. The Court in Thomas v Wyrick, did not decide the case as whether petitioner presented his federal claim to the State Courts. It should be noted the Court in Thomas v Wyrick, stated at page 414;

> "If the state courts decline to reach the merits of Thomas's claim because of some procedural default by him or his lawyer, state remedies would clearly have been exhausted. In this event Thomas may return to the District Court, which will then decide the merits of his federal constitutional claim."

The case herein obviously upon a reading of the dissent of Justice Pashman of the New Jersey Supreme Court unequivocall states that the evidentiary admission violates fundemental fair ness. The admission of the evidence was patently unfair, there by Justice Pashman cast his dissent in constitutional language. The State Courts obviously and clearly had an indication of constitutional infirmities. The U. S. Court of Appeals, Third Circuit, properly found that there was no state law presently available or state procedure for the determination of the merit for the petitioner's claim.

In Zicarilli v Grey, supra, to determine whether the same claim or subsequent equivalent of the claim has been previously presented to the State Court, it is necessary to ask whether "method anaylsis" ascerted in the Federal Courts were readily available to the State Court, 543, F 2d 472.

The Appellate Division of the Superior Court of New Jersey relied on U. S. v Toner, 173, Fed 2d 140, (3rd. Cir. 1949) in reversing the conviction. The "method anaylsis" was consistent with Fourteenth Amendment Due Process violation. Subsequently the New Jersey Supreme Court although reversing the Appellate Division decision still carried forward the same "method of anaylsis" but chose to set the standard as stated in State v Macon, 57 N.J. 325 as opposed to the standard set forth in Chapman v California, 386 U.S.19 (1966) and there making it impossible for the petitioner to reapply to the State Court for a determination of which standard is proper since the Court has

already spoken out. We know that to be so by an anaylsis and reading of Justice Pashman dissent in the opinion by New Jersey Supreme Court.

The Supreme Court majority ignored the standard for constitutional error set forth by the United States Supreme Court in Fahy v Connecticut, 375 U.S. 85, 84, S.Ct. 229,11 LEd 2d 171 (1967) and Chapman v California, 386 U.S. 18,87 S.Ct. 824, 17 L Ed 2d 707 (1966) wherein the United States Supreme Court said:

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 375 U.S. at 86-87.

and

> "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24.

and instead applied its own standard of error set forth in State v Macon, 57 N.J. 325 (1971) namely:

> "whether the error had a clear capacity to produce an unjust result."

The New Jersey Supreme Court ignored the mandate of the United States Supreme Court that:

> "Certainly error, constitutional error, admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

Because the substance of the appellant's state claim is

virtually indistinguishable from the due process allegation now before the federal court, and because the method of analysis is indistinct, the Picard test for exhaustion of state remedies has been met. This conslusion is especially appropriate because of the necessarily vague nature of a due process allegation. Failure to invoke the Due Process Clause more specifically should not therefore stand in the appellant's path to habeas relief, especially since the state courts understood and considered the "substantial equivalent" of the appellant's claims before this court and the court below.

POINT II

THE DUE PROCESS CLAUSE DOES NOT PRECLUDE THE ADMISSIBILITY OF AN ALLEGED CO-CONSPIRATOR'S GUILTY PLEA TO AFFECT THE CREDIBILITY OF THAT CO-CONSPIRATOR AS A WITNESS IN A STATE CRIMINAL PROCEEDING.

In the instant case, over the objection of counsel, the State brought out the fact that a co-defendant in the case had pleaded guilty to the charge of consiracy, the very charge the defendant was on trial for.

In his summation, the Prosecutor deliberately emphasized this and told the jury:

> "...(A) young man named Joseph Cicala pleaded guilty to conspiracy to break, enter and commit larceny inside the Bruno home. (The defendants) said it never happened, you see, Mr. Cicala pleaded guilty to something that didn't happen.
>
> "Ladies and gentlemen, isn't your intelligence being insulted by an argument like that? I mean, aren't these defendants talking down to you, as if you were a bunch of five year old children?"

When counsel for defendants rose to their feet to object they were shouted down and threatened by the court for "protecting the case."

The trial judge had previously told defense that they could not comment upon the fact that one co-defendant (Tosi) had received a directed verdict of acquittal and if defense counsel did so, the judge would allow the Prosecutor to comment on the

fact Cicala had pleaded guilty.

No limiting instruction was given by the trial judge and the jury were permitted to use the guilty plea as substantive evidence of the defendant's guilt and told to do so by the Prosecutor.

After two days of deliberations the jury returned a verdic of guilty.

The defendant appealed and the Superior Court, Appellate Division reversed the conviction stating:

> "It is fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy."

and upon the authority of United States v Toner, 173 F 2d 140 (3rd Cir. 1949) held that the plea of guilty of Cicala as an alleged co-conspirator should have been excluded and that its admission and the Prosecutor's comment thereon constituted "reversible error" because the defendants "were prejudiced to the extent they were denied a fair trial."

The Appellate Division followed the law as set forth in the Toner case. In Toner, the Third Circuit held that the guilty plea of a co-defendant who testified at the trial could not be used as substantive evidence of another defendant's guilty because:

> "The defendant had a right to have his guilt or innocence determined by the

> evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." 173 F 2d at 142.

The Supreme Court of New Jersey granted the State's petition for Certification and a divided court reversed the decisio of the Appellate Division and reinstated the conviction because "the error did not have the clear capacity to produce an unjust result."

The U. S. Court of Appeals, Third Circuit properly stated that the error did not amount to evidentiary irrelevance. The use of such evidence is sufficiently unfair so as to raise the spectre of unconstitutionality for purposes of Habeas Corpus relief. We ground this conclusion on the concept of fundemental fairness inherently required in every criminal trial. It is urged that the admission of the co-defendant's guilty plea coupled with the failure of the trial judge to give cautionary instructions to the jury about this evidence and the Prosecutor's comments of this evidence exceeded a tolerable level of ordinary trial error so as to amount to a denial of constitutional due process.

CONCLUSION

For the reasons stated above, Respondent, Robert Bisaccia, respectfully requests that this Court Deny the Petition for Writ of Certiorari to the United State Court of Appeals for the Third Circuit.

Respectfully submitted by,

Allen C Marra

ALLEN C. MARRA,
Counsel for Respondent,
Robert Bisaccia.